IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CRIMINAL APPEAL No 1017 of 1997
with
CRIMINAL APPEAL No 1004 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DALPATRAM CHHAGANLAL JOSHI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1017 of 1997
MR JM BUDDHBHATTI for Petitioner No. 1
MR MJ BUDDHBHATTI for Petitioner No. 1
Ms. B.R. Gajjar, APP, for Respondent No. 1
2. Criminal Appeal No. 1004 of 1997
MR EE SAIYED for Petitioner No. 1
Ms. B.R. Gajjar, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 03/10/2002

COMMON ORAL JUDGEMENT
(Per : MR.JUSTICE M.H.KADRI)

1. Criminal Appeal No.1017 of 1997 is filed by the original accused No.2, Dalpatram Chhaganlal Joshi, whereas Criminal Appeal No.1004 of 1997 is filed by the original accused No.1, Yusuf Noormamad Makrani, of Special Sessions Case No.64 of 1996, which was decided by the learned Additional Sessions Judge, Morbi, Rajkot, vide his judgment and order dated August 19, 1997, by which, he convicted both the accused-appellants under Sections 20(b)(ii) and 22 of the Narcotic Drugs & Psychotropic Substances Act,1985, and imposed the sentence of R.I. for ten years and fine of Rs.1 lakhs in default R.I. for one year for the offence under Section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act,1985 and the sentence of R.I. for ten years and fine of Rs.1 lakhs in default R.I. for one year for the offence under Section and 22 of the Narcotic Drugs & Psychotropic Substances Act,1985 ('Act' for short). It is further directed that both the sentences shall run concurrently. As common question of facts and law arise for our consideration, we propose to dispose of both the appeals by this common order.

2. The prosecution case, in brief, is as under: P.W.7, PSI, Kantilal Narainbhai Patel, was discharging his duties as Police Sub-Inspector in Rapid Response Cell, at Rajkot. On September 28, 1996, he received information from an informant that one person by the name of Yusuf Noormamad Makrani (accused No.1) was keeping narcotic substance, namely, charas, and was dealing in the said substance on the public road near the dargah situated near Smashan on Lilapar Road, of the town Morbi. The said information was entered in the station diary of Morbi City Police Station around 22 hrs. P.W.7 made arrangement to inform about the information to his immediate official superior. P.W.7 called independent panchas and they were made aware of the information, and they had shown their willingness to remain as panchas in the raid which was required to be carried out. A preliminary panchanama was prepared at the Morbi City Police Station at 22.20 hrs on September 28, 1996. P.W.7, in the company of two independent panchas and the police personnel, went to the place as mentioned in the information. When they reached near the dargah, one person was found running away when he saw that the police personnel were approaching him. The raiding party had chased the said person and he was apprehended. On interrogation, he disclosed his name as Yusuf Noormamad Makrani of Makranivas, Morbi. P.W.7 conveyed the information he had received to the said person and also informed him about his right to be searched in the presence of a Gazetted Officer or a Magistrate, as

required by Section 50 of the Act. The appellant, Yusuf Noormamad Makrani, opted for being searched in the presence of a Gazetted Officer. P.W.7, immediately, sent a request to P.W.6, D.S. Bhatt, who was at the relevant time discharging his duties as Deputy Superintendent of Police at Morbi, to remain present in the search to be carried out of the appellant, Yusuf Noormamad Makrani. P.W.6, D.S. Bhatt, received the request sent by P.W.7, PSI, Patel, and he immediately went to the place near the dargah where the appellant, Yusuf Noormamad Makrani, was detained. The appellant, Yusuf Noormamad Makrani, was asked whether he wanted the search of person by the police personnel and, thereafter, the search was carried out of the person of the appellant, Yusuf Noormamad Makrani, in the presence of the two independent panchas and the police personnel. Five small packets were found from the pocket of the shirt of the appellant, Yusuf Noormamad Makrani, which contained a substance like charas. When the appellant was interrogated, he disclosed that the said substance was charas, and when it was asked whether he was holding any pass or permit to keep the contraband substance, he said that he was not having any pass or permit. In the presence of the panchas and the police personnel, the contraband substance was weighed and it was found that the said substance was weighing 12 grams. The narcotic substance was sealed in the presence of the independent panchas and the police personnel. At the time of drawing the panchanama with regard to search and seizure of contraband substance, which was found from the appellant, Yusuf Noormamad Makrani, the Gazetted Officer, Deputy Superintendent of Police, D.S. Bhatt, PSI, Patel, the police personnel and two panchas were present. The signatures of the panchas were also obtained on a slip at the time of sealing the contraband substance. From the place of the incident where the search of the appellant, Yusuf Noormamad Makrani, was carried out, the police party along with the appellant, Yusuf Noormamad Makrani, went to his house and his house was also searched from where no contraband substance was found. When the appellant, Yusuf Noormamad Makrani, was interrogated with regard to the place from where he had brought the contraband substance, he disclosed that he had purchased the said contraband substance from Dalpatram Chhaganlal Joshi (accused No.2). The appellant, Yusuf Noormamad Makrani, had shown the house of Dalpatram Chhaganlal Joshi. P.W.7, PSI, Patel, obtained a search warrant from the competent Judicial Magistrate under Section 41(1) of the Act to carry out search of the house of Dalpatram Chhaganlal Joshi. The house of the appellant, Dalpatram Chhaganlal Joshi, was searched in the presence of the two

independent panchas, P.W.6, D.S. Bhatt (Gazetted Officer), P.W.7, PSI, Patel and other police personnel, and it was found out from the house of the appellant, Dalpatram Chhaganlal Joshi, that the contraband substance, charas, in the quantity of 210 grams, was hidden underneath the mattress. The said contraband substance was also seized under a panchanama. The currency notes of Rs.1350 were found which were also seized under a panchanama. The contraband substance found from the house of the appellant, Dalpatram Chhaganlal Joshi, was also seized under the panchanama wherein the slip containing signatures of panchas was affixed and the muddamal substance was sealed bearing the impression of R.R. Cell, Morbi. P.W.7, PSI, Patel, completed drawing of panchanamas of search and seizure of appellant, Yusuf Noormamad Makrani, and the house of the appellant, Dalpatram Chhaganlal Joshi, at around 1 a.m. on September 29, 1996. Both the appellants were arrested for the offences under the Act. The appellants as well as the muddamal contraband substance and the currency notes seized from the appellants were handed over to the police station officer, Morbi City Police Station. P.W.5, Police Head Constable, Rameshchandra Jethalal, who was discharging his duties as Police Station Officer incharge of Morbi City Police Station, had registered the First Information Report lodged by P.W.7, PSI, Patel, against the appellants under Sections 20(b)(ii) and 22 of the Act. P.W.5 had handed over the muddamal contraband substance to the crime writer head of the Morbi City Police Station for keeping the same in the safe custody. After entering the First Information Report in the police-station register, the investigation of the offences registered against the appellants was handed over to P.W.7, PSI, Patel. On September 29, 1996, P.W.8, Police Constable, Govind Narainbhai, who was discharging his duty at Morbi Police Station, had taken the said contraband muddamal substance for analysis to Forensic Science Laboratory, at Junagadh. The report of the FSL indicated that it was a narcotic substance, namely charas, as defined under the NDPS Act. After completing the investigation, a chargesheet came to be filed against the appellants in the Sessions Court, at Morbi, wherein, it came to be numbered as Special Sessions Case No.64 of 1996.

3. Charge Exh.1 was framed against the appellants under Sections 20(b)ii) and 22 of the Act, which was read over and explained to them. The appellants pleaded not guilty and claimed to be tried. To prove the charges framed against the appellants, the prosecution examined (1) P.W.1, panch witness, Suresh Dhirajlal, Exh.6; (2)

P.W.2, Gopal Shamjibhai, panch witness, Exh.8; (3) P.W.3, Police Head Constable, Ranvirsinh Jatuba Chudasma, who was a member of the raiding party, Exh.9; (4) P.W.4, Police Head Constable, Pravinsinh Babuba Zala, Exh.13, a member of the raiding party; (5) P.W.5, Police Head Constable, Rameshchandra Jethalal, Police Station Officer in-charge of the Morbi City Police Station, at Exh.14; (6) P.W.6, Deputy Superintendent of Police, Mr. Deepak Shankerlal Bhatt, at Exh.19; (7) P.W.7, PSI, Kantilal Narainbhai Patel of Rapid Rasonse Cell of Morbi City Police Station, at Exh.28; and (8) P.W.8, Police Constable, Govind Narinbhai of Morbi City Police Station who had delivered the muddamal contraband substance to the FSL at Junagadh at Exh.48. The prosecution also produced documentary evidence such as panchanamas of search and seizure of the appellant, Yusuf Noormamad Makrani, search at his house, search of house of the appellant, Dalpatram Chhaganlal Joshi, and seizure of contraband substance found from the appellant, Yusuf Noormamad Makrani, and from the house of the appellant, Dalpatram Chhaganlal Joshi, recovery of currency notes from both the appellants; Exh.7, Entry No.26/95 of Morbi Police Station diary with regard to information received by P.W.7, PSI, Patel, on September 28, 1996 at 22 hrs.; Exh.10, grounds with regard to search and seizure of the appellant, Yusuf Noormamad Makrani, to be carried out by P.W.7 between the sunset and sunrise as provided under proviso to Section 42 of the Act; Exh.12, search warrant issued by the Judicial Magistrate, First Class, Morbi, for search and seizure to be carried out at house of the appellant, Dalpatram Chhaganlal Joshi; Exh.15, station diary entry No.2 of 1996 dated September 29, 1996 of Morbi City Police Station; Exh.18, certified copy of the extracts of the office of the Joint Sub-Registrar, Morbi, with regard to the property purchased by the wife and the son of the appellant, Dalpatram Chhaganlal Joshi, Exh.22, the letter of request sent to the Deputy Superintendent of Police, Mr. Bhatt to remain present at the time of search of the appellant, Yusuf Noormamad Makrani; Exh.25, report submitted by P.W.7, PSI Patel, with regard to arrest of the appellants and search and seizure of contraband substance and recovery of currency notes from them, sent to Shri D.S. Bhatt, Deputy Superintendent of Police, Morbi Division; Exh.29, complaint lodged by P.W.7, PSI, Patel, on September 29, 1996; Exh.30, report of P.W.7, PSI, Patel, under Section 42 of the Act with regard to search of the house of the appellant, Dalpatram Chhaganlal Joshi; Exh.31, forwarding letter to the FSL; and Exh.32, report of the FSL. On completion of evidence led by the prosecution, the learned Special Judge questioned the appellants and their statements came to be

recorded under Section 313 of the Code of Criminal Procedure. The appellant, Yusuf Noormamad Makrani, in his further statement, stated that a false case was lodged against him and no contraband article was seized from his person and the money which was alleged to be recovered from him was called from his house on the next day. He claimed that the currency notes belonged to him. However, he claimed that the charas was not recovered from his person. The appellant, Dalpatram Chhaganlal Joshi, in his further statement, stated that the contraband substance was not recovered from his possession. However, he has stated that the currency notes were produced by his wife subsequently after the search of his house was carried out. The appellant, Dalpatram Chhaganlal Joshi, claimed that the contraband substance and the currency notes did not belong to him and the house where the search was carried out belonged to his wife and his son. Both the appellants submitted memorandum of written arguments under Section 314 of the Code which came to be admitted in evidence at Exh.50.

4. The learned Additional Sessions Judge, after appreciating oral as well as documentary evidence and the arguments advanced by the learned advocates for the parties, deduced that it was proved beyond doubt that, on September 28, 1996, at around 22 hrs, the appellant, Yusuf Noormamad Makrani, possessed illegal prohibited contraband substance, charas, in the quantity of 12 grams in his possession which was meant for sale. The learned Additional Sessions Judge further deduced that the appellant, Dalpatram Chhaganlal Joshi, had stored prohibited contraband substance in his house situated at Vajepar Sheri. No.2, near the hospital of Dr. Acharya, which was hidden below the mattress in the house and the said contraband substance weighed 210 grams. It is further deduced that both the appellants did not possess pass or permit for the said contraband substance. On the basis of the abovereferred conclusion, the learned Additional Sessions Judge convicted both the accused-appellants under Sections 20(b)(ii) and 22 of the Narcotic Drugs & Psychotropic Substances Act,1985, and imposed the sentence of R.I. for ten years and fine of Rs.1 lakhs in default R.I. for one year for the offence under Section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act,1985 and the sentence of R.I. for ten years and fine of Rs.1 lakhs in default R.I. for one year for the offence under Section and 22 of the Narcotic Drugs & Psychotropic Substances Act,1985, which has given rise to filing of the above appeals by the appellants (original accused Nos. 1 and 2).

5. Learned advocate Mr. M.J. Buddhabhatti, who has appeared for the appellant, Dalpatram Chhaganlal Joshi, learned advocate Mr E.E. Saiyed, who has appeared for the appellant, Yusuf Noormamad Makrani, and learned APP, Ms. B.R. Gajjar, have taken us through the entire record and proceedings of the appeals.

6. Learned advocate Mr E.E. Saiyed, for the appellant, Yusuf Noormamad Makrani, has submitted that, when the search of the appellant, Yusuf Noormamad Makrani, was carried out, he was not made aware of his right as to whether he wanted to be searched in the presence of a Gazetted Officer or in the presence of a Magistrate. The learned advocate has submitted that, as per the decision of the Supreme Court in the case of State of Punjab vs. Baldev Singh, reported in AIR 1999 Supreme Court 2378 [=(1999) 6 SCC p.172], the raiding officer had not complied with the provisions of Section 50 of the Act and, hence, the search carried out of the person of the appellant, Yusuf Noormamad Makrani, was in clear violation of Section 50 of the Act and, therefore, the whole case against the appellant, Yusuf Noormamad Makrani, should fail and the conviction and sentence imposed on him deserve to be quashed and set aside. The learned advocate, Mr. E.E. Saiyed, has further submitted that there was a clear breach of Section 42(2) of the Act, as P.W.7, PSI, Patel, had not sent copy of the report and the information taken down and the grounds for his belief with regard to search and seizure of the appellant, Yusuf Noormamad Makrani, between sunset and sunrise, to his immediate official superior. It is further submitted that P.W.7, PSI, Patel, had not followed the mandatory provision of Section 42(2) of the Act. It is submitted that the Apex Court, in the case of Baldev Singh (supra) has held that under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior, and, if there is total non-compliance of this provision, the same affects the prosecution case, and, to that extent it is mandatory. It is submitted by the learned advocate, Mr. E.E. Saiyed, that, as there was a clear violation of the provisions of Sections 50 and 42(2) of the Act, the conviction and sentence imposed on the appellant, Yusuf Noormamad Makrani, deserve to be quashed and set aside.

7. Learned advocate Mr. M.J. Buddhabhatti, who has appeared for the appellant, Dalpatram Chhaganlal Joshi, has submitted that the prosecution has failed to prove

that the house, wherein the search was carried out, belonged to the appellant, Dalpatram Chhaganlal Joshi, because, as per the documentary evidence produced by the prosecution, the house, wherein the search was carried out, belonged to the wife and the major son of the appellant, Dalpatram Chhaganlal Joshi, and, therefore, the prosecution had not proved beyond doubt that the said house belonged to the the appellant, Dalpatram Chhaganlal Joshi, and the contraband substance recovered from the said house belonged to the appellant, Dalpatram Chhaganlal Joshi. It is further submitted that the prosecution had failed to prove that the appellant, Dalpatram Chhaganlal Joshi, was in conscious possession of the contraband article. Learned advocate Mr. M.J. Buddhabhatti next contended that the report of the FSL, Exh.32, was not a complete report and the Analyst, who had come to the conclusion that the substance which was sent for analysis was contraband substance as defined under the Act, had not followed all the procedure prescribed under the Act and the Rules and, therefore, no conviction on the basis of such FSL report which was not reasoned and complete one could have been recorded against the appellants. Learned advocate Mr. M.J. Buddhabhatti, also submitted that, except the confession of the co-accused-appellant, Yusuf Noormamad Makrani, during search and seizure at his house, that he had purchased the contraband substance from the appellant, Dalpatram Chhaganlal Joshi, no independent evidence was led by the prosecution implicating the appellant, Dalpatram Chhaganlal Joshi, that he was in conscious possession of contraband substance which was stored for the purpose of sale. Learned advocate Mr. M.J. Buddhabhatti also submitted that, after the muddamal contraband substance was handed over to Morbi City Police Station by P.W.7, PSI, Patel, the police officer in-charge of the said police station had not affixed the seals on the said muddamal and, therefore, there was a clear breach of the provisions of Section 55 of the Act. Learned advocate Mr. M.J. Buddhabhatti further submitted that during search of the appellant, Yusuf Noormamad Makrani, it was disclosed by him that he had purchased contraband substance from the appellant, Dalpatram Chhaganlal Joshi, but the said information was not written down or entered in the station diary of the concerned police station and a mention was only made in the panchanama, which was not sufficient compliance of Section 42 of the Act. It is further submitted that, in the case of the appellant, Dalpatram Chhaganlal Joshi, there was violation of mandatory provision of Section 42(2) of the Act, as P.W.7, PSI, Patel, had not sent copy of the report and the information taken down and the

grounds for his belief with regard to search and seizure of the appellant, Dalpatram Chhaganlal Joshi, between sunset and sunrise, to his immediate official superior. It is submitted that the Apex Court, in the case of Baldev Singh (supra), has held that under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. It is submitted by the learned advocate, Mr. M.J. Buddhabhatti that, as there was a clear violation of the provisions of Section 42(2) of the Act, the conviction and sentence imposed on the appellant, Dalpatram Chhaganlal Joshi, deserve to be quashed and set aside.

8 Learned APP, Ms. B.R. Gajjar, has supported the reasons recorded and the conclusion arrived at by the learned Additional Sessions Judge in the impugned judgment and has submitted that there was sufficient compliance of provisions of Section 50 of the Act. The learned APP has submitted that P.W.7, PSI, Patel, in his oral testimony, had, in terms, deposed that the appellants were made aware of their right that, if they wanted to be searched in the presence of a Gazetted Officer or a Magistrate, they should give the option. It is submitted that, accordingly, when the appellant, Yusuf Noormamad Makrani, opted for search before the Gazetted Officer, a request was sent to P.W.6, Deputy Superintendent of Police, D.S. Bhatt, who was Gazetted Officer, to remain present during the search of the appellant, Yusuf Noormamad Makrani. The learned APP has further submitted that the report of the FSL, Exh.32, was a complete and reasoned report, which indicates that, before coming to the conclusion that the contraband substance contained botanical material of cannabis sativa, the scientific officer had carried out physical examination, chemical examination and botanical examination. She has further submitted that, as per the report Exh.32, the Biology Division of Regional Forensic Science Laboratory, Junagadh, had also carried out the test of the contraband substance and, as per the report, both the exhibit marked A and B contained botanical material of cannabis sativa. It is, therefore, submitted by the learned APP that the abovereferred conclusions were arrived at by the Scientific Officer and the Deputy Director of the FSL after carrying out the required test as prescribed under the Act and, therefore, it should be held that the report was complete and reasoned one.

9 The submission of the learned advocate Mr E.E.

Saiyed, for the appellant, Yusuf Noormamad Makrani, that there was no strict compliance of the provision of Section 50 of the Act when the person of the appellant, Yusuf Noormamad Makrani, was searched, deserves merit. The Supreme Court, in the case of Baldev Singh (supra), has in terms held that:

"The provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the Investigating Officer (empowered officer) to ensure that search of the concerned person (suspect) is conducted in the manner prescribed by Section 50, by intimating to the concerned person about the existence of his right, that if he so requires he shall be searched before a Gazetted Officer or a Magistrate and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, would cause prejudice to an accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act."

The oral testimony of P.W.7, PSI, Patel, does not show that the appellant, Yusuf Noormamad Makrani, was made aware of the above right of being searched in the presence of a Gazetted Officer or a Magistrate. The oral testimony of P.W.6, Deputy Superintendent of Police, Mr. D.S. Bhatt, also does not indicate beyond doubt that the appellant, Yusuf Noormamad Makrani, was made aware of the above right. The documentary evidence, i.e. the FIR lodged by PSI, Patel, Exh.29, is silent whether the appellant, Yusuf Noormamad Makrani, was made aware of his right to be searched before a Gazetted Officer or a Magistrate. The panchanama of search and seizure Exh.7 does indicate that an option was given to the appellant, Yusuf Noormamad Makrani, whether he wanted to be searched in the presence of a Gazetted Officer or a Magistrate. It may be noted that the panchas examined to prove the panchanama had not supported the case of the prosecution and had turned hostile. It is surprising that, when the panchas had turned hostile and had not admitted the contents in the panchanama, how the learned Additional Sessions Judge had admitted the whole panchanama in evidence. The panchas had only admitted their signatures in the said panchanama. It is also worthnoting that the slips which were affixed on the muddamal charas were not shown to the panchas at the time of recording of their evidence. Thus, in our opinion, the panchanama was not proved in the eye of law. However, the learned APP has submitted that the police personnel of the raiding party and the evidence of P.W.7, PSI, Patel, proved that the

appellant, Yusuf Noormamad Makrani, was made aware of his right as stated in the panchanama. We are not impressed by the submission of the learned Additional Public Prosecutor. Other raiding personnel, who were present at the time of the search and seizure, had not specifically stated that an option was given to the appellant, Yusuf Noormamad Makrani, that, if he wanted to be searched in the presence of a Gazetted Officer or a Magistrate, he could give an option. The members of the raiding party had only deposed that the appellant was only given option whether he wanted to be searched in the presence of a Gazetted Officer. As per their evidence, no option was given to appellant, Yusuf Noormamad Makrani, about the choice of giving search in the presence of a Magistrate. Taking into consideration oral as well as documentary evidence, we are of the opinion that there was total non-compliance of Section 50 of the Act while carrying out search of the appellant, Yusuf Noormamad Makrani. If the search is found to be illegal, the seizure of contraband article from the appellant, Yusuf Noormamad Makrani, looses importance and, consequently, the report of the FSL, which indicated that the said article was contraband substance, also becomes of no consequence.

10 The other submission of the learned advocate Mr E.E. Saiyed, that there was noncompliance of Section 42(2) of the Act also deserves to be accepted. P.W.7, PSI, Patel, in his oral testimony, has nowhere stated that he had sent intimation with regard to information and grounds for carrying out the search to his immediate official superior. The learned APP has also taken us to the evidence of P.W.7, PSI, Patel, but she has not been able to pinpoint any evidence indicating that there was compliance of Section 42(2) of the Act. As stated earlier, in the case of Baldev Singh (supra), the Apex Court has held that the provisions of Section 42(2) are mandatory and non-compliance thereof would render the whole prosecution case illegal. In this case, we find that P.W.7, PSI, Patel, had not complied with the mandatory provision of Section 42(2) of the Act and, therefore, the conviction and sentence imposed on the appellant, Yusuf Noormamad Makrani, deserve to be quashed and set aside on that ground also.

11 With regard to the contention raised by the learned advocate Mr. M.J. Buddhabhatti, for the appellant, Dalpatram Chhaganlal Joshi, that the report of the FSL is not complete and reasoned one, we are of the opinion that the said contention does not deserve any merit. The report of FSL, Exh.32, is a complete one and

the Analyst as well as the Deputy Director of the FSL had carried out all the required tests, such as physical examination, chemical examination and botanical examination, before coming to the conclusion that the contraband substance contained botanical material of cannabis sativa. As per the report Exh.32, the Biology Division of Regional Forensic Science Laboratory, Junagadh, had also carried out the test of the contraband substance and, as per the report, both the exhibit marked A and B contained botanical material of cannabis sativa. In our view, the Report of the FSL is a reasoned one and based on scientific test carried out to find out whether the contraband article was a narcotic substance or not. However, we find that, in the case of the appellant, Dalpatram Chhaganlal Joshi, there was non-compliance of mandatory provisions of Section 42(2) of the Act in as much as on receiving information from the co-accused, Yusuf Noormamad Makrani, that he had purchased contraband article from the appellant, Dalpatram Chhaganlal Joshi, no entry was made in the police station diary, nor the information was noted down in writing by P.W.7, PSI, Patel. The offence under NDPS Act is a serious one where the minimum sentence for ten years is prescribed and P.W.7, PSI, Patel, had failed to observe the mandatory provision. It was not proved beyond doubt that the appellant, Dalpatram Chhaganlal Joshi, was in conscious possession of contraband article when it was recovered from the house alleged to have been of his ownership. The documentary evidence, on the contrary, indicated that the said house was purchased by the wife and the major son of the appellant, Dalpatram Chhaganlal Joshi. The learned APP has submitted that the appellant, Dalpatram Chhaganlal Joshi, in his further statement, admitted that the currency notes were recovered subsequently after the raid at his house. In our opinion, it is not the sufficient evidence to come to the conclusion that the house where the raid was carried out and the currency notes and contraband article were seized, belonged to the appellant, Dalpatram Chhaganlal Joshi, and he was in conscious possession of the said contraband article. In the case of the appellant, Dalpatram Chhaganlal Joshi, also, there was noncompliance of Section 42(2) of the Act which also vitiates the trial against him.

12 As noted earlier, during the search and seizure of the person of the appellant, Yusuf Noormamad Makrani, there was noncompliance of mandatory provision of Sections 50 and 42(2) of the Act and, therefore, the conviction and sentence imposed against him deserve to be quashed and set aside. With regard to the appeal filed by the appellant, Dalpatram Chhaganlal Joshi, we are of

the view that the raiding party had not followed the mandatory provision of Section 42(2) of the Act and, therefore, his conviction and sentence imposed on him also deserve to be quashed and set aside.

13. As a result of foregoing reasons, Criminal Appeal No.1017 of 1997 and Criminal Appeal No.1004 of 1997 are allowed. The conviction under Sections 20(b)(ii) and 22 of the Narcotic Drugs & Psychotropic Substances Act,1985, and the sentence of R.I. for ten years and fine of Rs.1 lakhs in default R.I. for one year for the offence under Section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act,1985 and the sentence of R.I. for ten years and fine of Rs.1 lakhs in default R.I. for one year for the offence under Section and 22 of the Narcotic Drugs & Psychotropic Substances Act,1985, imposed by learned Additional Sessions Judge, Morbi, Rajkot, vide his judgment and order dated August 19, 1997, in Special Sessions Case No.64 of 1996, against both the appellants are quashed and set aside, and both the appellants, Yusuf Yusuf Noormamad Makrani (original accused No.1) and Dalpatram Chhaganlal Joshi, (original accused No.2) are ordered to be set at liberty forthwith if their presence is not required in connection with any other criminal case. The muddamal be destroyed in terms of directions contained in the impugned judgment.

(M.H. Kadri, J.)

(H.H. Mehta, J.)
(swamy)